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JAMES R. BROWNING, Clerk

In the
Supreme Court of the United States

OCTOBER TERM 1960

No. 283

FIRST NATIONAL BANK OF CHIPPEWA FALLS, A CORPORATION
Plaintiff and Petitioner

VS.

CHARLES HENNEMAN COMPANY, A CORPORATION
Defendant

ANDY JOHNSON AND VIOLET JOHNSON
Defendants and Petitioners

UNITED STATES OF AMERICA
Defendant and Respondent

FRANK HAUPTMANN, AS RECEIVER OF CHARLES HENNEMAN COMPANY
Defendant

CHIPPEWA COUNTY
Defendant and Respondent

JOINT PETITION FOR WRIT OF CERTIORARI OF FIRST NATIONAL BANK OF CHIPPEWA FALLS, AND ANDY JOHNSON AND VIOLET JOHNSON

WILEY AND DEVINE
Attorneys for Joint Petitioners, Andy Johnson and Violet Johnson
MR. MARSHALL WILEY
Counsel of Record for Andy Johnson and Violet Johnson
INGOLF E. RASMUS AND JAMES B. HALFERTY
Attorneys for Ioint Petitioner, First National Bank of Chippewa Falls

Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

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JOINT PETITION FOR WRIT OF CERTIORARI OF FIRST NATIONAL BANK OF CHIPPEWA FALLS, AND ANDY JOHNSON AND VIOLET JOHNSON

PRINTED OPINIONS OF COURTS BELOW

Official Reporter: 10 Wis. 2d 260, Advance Sheets, No. 3.
Unofficial Reporter: 103 N. W. 2d 24.

STATEMENT OF JURISDICTIONAL GROUNDS

(1) The decision of the Wisconsin Supreme Court here sought to be reviewed was dated and entered May 3, 1960.

(2) No rehearing was requested nor was time for petitioning for Certiorari extended.

(3) Jurisdiction of the cause is conferred on the Supreme Court of the United States by Section 1257(3), *Title 28, U. S. Code*, which provides as follows:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court, as follows: * * *
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes, or commission held or authority exercised under, the United States."

QUESTIONS FOR REVIEW

I. In those cases where a federal income tax lien exceeds the value of the taxpayer's property, and where that property is subject to mortgages which are prior to the federal lien, may state or local government, after the federal lien is filed, continue to levy and collect a real estate tax on the full market value of the property, or is it barred from taxing that part of the property taken by the federal lien, by:

(a) The statutes creating and defining the federal lien, or,

(b) The due process clause of the Fourteenth amendment to the Federal Constitution, or,

(c) The equal protection clause of the Fourteenth Amendment to the Federal Constitution?

II. If the county's tax can be lawfully levied and collected, then may the mortgagees pay it and add it to the sums due under their mortgages at the expense of the federal lien where their mortgages or state law give them that right as against all later liens?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Full text set out in Appendix II., Page 18a.)

I. Constitutional Provisions.

Article XIV, Sec. 1, United States Constitution.

II. United States Statutes involved:

28 U. S. C. 1257(3)
26 U. S. C. 3670
26 U. S. C. 3672
26 U. S. C. 3704(c)(2)

III. *Wisconsin Statutes* involved:

1951, Sec. 70.01
1951, Sec. 70.02
1951, Sec. 70.03
1951, Sec. 70.10
1951, Sec. 70.17
1951, Sec. 70.32(1)
1951, Sec. 278.10(4)

STATEMENT OF THE CASE

I. Statement of facts. (Pursuant to Rule 23(e)).

This joint petition for Certiorari is brought to review a decision of the Supreme Court of the State of Wisconsin entered on May 3, 1960. The decision of the Wisconsin Supreme Court is reported in Vol. 10, Wisconsin Reports, Second Series, page 60, Advance Sheets, No. 3. It is reported in the Unofficial Reporter in Vol. 103 N. W. 2d 24.

The suit is a mortgage foreclosure action and the questions involve the relative priorities of a first mortgage, a second mortgage, a federal tax lien, and a local real estate tax lien.

The case was tried on stipulated facts and was submitted to the trial court on March 22, 1955 (Record page 102).

The pertinent facts are as follows:

A tax audit of the Charles Henneman Company of Chippewa Falls, Wisconsin was performed covering the years 1942 to 1946 and 1948.

As a result of that audit, unpaid federal income and excess profits taxes in the amount of $95,025.43 were assessed against the company on March 15, 1951 (Record pages 90, 91). On March 21, 1951, the assessment lists were received by the District Collector of Internal Revenue at Milwaukee, Wisconsin (Record page 91). (This is the date that the federal lien became effective as against Chippewa County.) On April 20, 1951, a notice of the federal lien was filed in the office of the Register of Deeds for Chippewa County, Wisconsin and the lien thereupon became perfected as against all subsequent purchasers (Record page 92).

At the time the federal lien was filed, the company owned three parcels of real estate.

The first of these three parcels was a garage building. This was subject to a first mortgage in favor of the First National Bank of Chippewa Falls, Wisconsin in the face amount of $35,000.00. The mortgage was dated January 6, 1948 and properly recorded and provided for payments of $486.85 per month (Record pages 131, 132). The garage building was also subject to a second mortgage in favor of Andy Johnson and Violet Johnson for a face amount of $20,000.00 (Record pages 134, 135).

The second and third parcels of real estate owned by the company were, respectively, a vacant lot and a residence. The Johnsons' $20,000.00 mortgage was a first mortgage as to each of these parcels (Record page 146, Ex. 4).

In addition, the Johnsons owned a mortgage for $1,000.00 against the vacant lot. This was a second mortgage (Record page 149, Ex. 7).

After the federal lien was filed, the company defaulted in the payment of real estate taxes assessed against the above property by the City of Chippewa Falls (Record page 97). The unpaid taxes were for the years 1951 to 1954 inclusive and amounted to a total principal sum of $15,871.35 (Record page 157). (They have borne interest at the rate of .8% per month during the pendency of this action and interest now amounts to a sum in excess of $9,000.00 (Record page 157).) An itemization of taxes and interest due as of January 20, 1959 is shown at Appendix III, p. 22a).

The company defaulted on the payment of the bank mortgage on December 9, 1953 (Record page 132) and on the payment of the Johnsons' first mortgage on April 1, 1953 (Record page 134).

During the years 1951, 1952 and 1953, the company tried to compromise its tax liability with the government

but was unsuccessful (Record page 111). On January 11, 1954, it made a voluntary assignment for the benefit of its creditors, under a Wisconsin Insolvency Statute (Record pages 111, 112). The three parcels of real estate were sold in that insolvency proceeding for a total sum of $60,500.00 and the proceeds from their sale were paid to the Clerk of Court for Chippewa County, Wisconsin, where they are now held pending the decision of this cause (Record pages 112, 113). The sale price was allocated among the parcels as follows:

Garage Building	$49,000.00
Vacant Lot	4,500.00
Residence	7,000.00
Total	$60,500.00

(Record page 112).

The Johnsons' mortgages all contained provisions permitting them to pay any real estate taxes not paid by the company, and add them to their lien at the expense of later lienors (Record pages 146, 147, 149, Exhibits 4, 5, 7). The bank's mortgage did not contain such a provision but under the law of Wisconsin, such a provision is implied in the mortgage.

59 C. J. S., Mortgages, Sec. 325, p. 442;
Cobban v. Northern Wisconsin State Fair Association (1933), 212 Wis. 235, 248 N. W. 871;
Johnson v. Ryan (1926), 188 Wis. 620, 206 N. W. 871;
Hackett v. Vandusen (1907), 132 Wis. 204, 111 N. W. 1097;
Heller v. Neeves (1896), 93 Wis. 637, 67 N. W. 923.

On May 14, 1954, the bank began the present action to foreclose its mortgage (Record pages 2, 3).

The City of Chippewa Falls had sold its claims for taxes to Chippewa County, pursuant to provisions made in the *Wisconsin Statutes* (Record page 94). The county was joined as a defendant in the foreclosure action in November of 1954 by the service of a second amended complaint (Record page 52).

In the foreclosure action, each party claimed absolute priority (Record pages 60, 61, 70, 75) except for the Johnsons who admitted that they were junior to the bank as to the garage property but claimed priority as against all other parties (Record pages 66, 67, 32, 33).

On June 20, 1959, the trial court decided the action and found the order of priority to be:

1. The mortgagees.
2. The United States.

The trial court, in its opinion, stated that the federal lien had taken all of the real estate of the company except for the mortgagees' interests. It found that there was nothing left to tax except the mortgages, and pointed out that, although Wisconsin had once taxed mortgagees separately from the mortgagor's interest, it no longer did. It, therefore, was of the opinion, that the county's taxes were unlawful and uncollectable (Record pages 114, 115, 118, 120; Appendix I, pages 1a-3a).

About September 1, 1959, the county appealed to the Wisconsin Supreme Court. (The notice of appeal was served on different parties at different times and we do not have the exact date it was last served so that we cannot state the exact date of the appeal.) The cause was argued April 4, 1960 and decided on May 3, 1960.

The Supreme Court of Wisconsin held that priority as between the mortgagees and the United States was governed by federal law. It, therefore, ordered that the trial court

deduct from the funds available for distribution a sum equal to the amount of the mortgages and pay the balance to the United States in satisfaction of its lien. However, it then found that priority between the county and the mortgagees was governed by Wisconsin law and it, therefore, ordered that the county's claim for taxes be satisfied out of the fund set aside for the mortgagees because under Wisconsin law, real estate taxes have absolute priority over all other claims. The Wisconsin court did not discuss the claim that the county's taxes were illegal. Nor did it mention or decide any of the other federal questions raised by the mortgagees in their briefs.

The record was remanded from the Wisconsin Supreme Court to the Circuit Court for Chippewa County on June 30, 1960 (Record page 248).

The motion for judgment was heard on July 19, 1960. The judgment, as entered finds that the bank's mortgage, on that date, amounted to $8,459.15, and the Johnsons' mortgages amounted to $27,782.16. The $66,881.52 available for distribution was awarded as follows:

Bank	None
County	$26,033.21
United States	30,640.21
Johnsons	10,208.10

The judgment allows the county to satisfy its tax lien out of the proceeds set aside for the mortgages (Record pages 536-540, Appendix IV, pages 28a-35a).

II. Federal questions raised (Rule 23 (1) (f)).

Because of the manner in which the opinions of the lower courts were written, we have returned the briefs of counsel with the record. The briefs in the trial court are not a part of the record proper, but the briefs in the Supreme

Court of Wisconsin are. We have paged all of the briefs as part of the record.

The first federal question is as follows:

> "I. In those cases where a federal income tax lien exceeds the value of the taxpayer's property, and where that property is subject to mortgages which are prior to the federal lien, may state or local government, after the federal lien is filed, continue to levy and collect a real estate tax on the full market value of the property, or is it barred from taxing that part of the property taken by the federal lien, by:
>
> (a) The statutes creating and defining the federal lien, or,
>
> (b) The due process clause of the Fourteenth Amendment to the Federal Constitution, or,
>
> (c) The equal protection clause of the Fourteenth Amendment to the Federal Constitution?"

This question was first set out expressly in a brief filed in the trial court by the co-petitioners, Johnsons. They said:

> "Consequently, the defendants Johnson submit that they have the contractual right to pay the delinquent real estate taxes and add such amounts so paid to the amount of their mortgage indebtedness, which is entitled to priority against the Government, under Section 2672, or, in the alternative, that, if such mortgagees cannot obtain for such payment of delinquent real estate taxes the same priority as the mortgage indebtedness is entitled to under Section 3672, then the municipality cannot constitutionally overleap the intervening government lien and take from the mortgagee that portion of the mortgagee's security which equals the amount of the delinquent real estate taxes.
>
> "These mortgagees offer another suggestion for the consideration of the Court. We are dealing with

equitable principles, and the mortgagees contend that if they have to pay real estate taxes out of their mortgage funds, such taxes should be based upon the mortgagees' share of the real estate, and not on the entire assessed valuation of the real estate. This lawsuit demonstrates very clearly that, after deducting the mortgagees' share of the real estate, the balance of the real estate actually belongs to the United States. The United States does not have title to the real estate, because it has not foreclosed its lien; and, therefore, technically the local municipality might still have some legal basis for assessing real estate taxes: But, it does not have any equitable basis for requiring the mortgagees to pay taxes on the entire assessed valuation. The application of this principle is important with reference to the principal piece of property. As to the other two pieces of property, there would be no argument. However, on the principal piece of property, the balance owing the plaintiff and the defendants Johnson would approximate $16,000.00; whereas the property has an assessed valuation of some $90,000.00. Where everything beyond the $16,000.00 belongs to the United States Government, why should not a court of equity limit the municipality's recovery of delinquent real estate taxes to that based upon the amounts owing on the first and second mortgages?" (Record pages 224-21, 224-22, Appendix III, pages 23a, 24a).

This was the basis for the trial court's decision. In its memorandum of decision it said:

"It is not apparent how in the circumstances present the rights of lien claimants which are completely overriden by the encompassing size of the federal tax lien can in effect be revived. Without a mortgage on these premises there is nothing left for local real estate taxes, and accordingly where there is such a mortgage there is nothing after the mortgage to which

such taxes can attach. It is the property, not the mortgage, which is taxable, and the federal lien has taken that" (Record page 115, Appendix I, page 2a).

The Johnsons claimed an absolute priority subject only to the bank's first mortgage. In their answer and cross complaint, they demanded judgment as follows:

> "* * * that after payment of the amounts due plaintiff, these defendants be paid out of the proceeds the amounts adjudged and determined to be owing them * * *" (Record page 32, Appendix III, page 22a).

The Bank's second amended complaint also claimed absolute priority for its first mortgage. Its prayer for relief contained the following:

> "* * * that the plaintiff be paid the amount due on said note and mortgage, with interest to the time of such payment, together with the costs and disbursements of this action and $350.00 attorneys' fees and such additional amounts as the plaintiff may advance for payment of taxes * * *" (Record pages 60, Appendix III, page 22a).

In the Supreme Court of Wisconsin, the question was fully briefed by both the Bank and the Johnsons.

The Bank's brief discussed the problem at record pages 429 to 440. The Bank claimed: (1) That under Wisconsin law the County could not levy a tax against the property because in Wisconsin real estate is taxed to the owner, and the record owner, the Charles Henneman Co., had no interest in the property after the federal lien attached; (2) That if any tax could be lawfully collected it could only be a tax based on the value of the mortgagees' interest, since the federal interest was exempt from taxation.

The Johnsons also discussed this problem in their brief (Record pages 404-415).

The Wisconsin Supreme Court did not discuss this problem in its opinion, but it did decide that the County could collect the whole of its tax from the funds allocated to pay the mortgagees (Record pages 233-246, Appendix I, pages 3a-17a).

The second federal question is as follows:

> "II. If the county's tax can be lawfully levied and collected, then may the mortgagees pay it and add it to the sums due under their mortgages at the expense of the federal lien where their mortgages or state law give them that right as against all later liens?"

The Bank's prayer for relief in its second amended complaint read as follows:

> "Wherefore, the plaintiff demands judgment * * * that the plaintiff be paid the amount due on said note and mortgage, with interest to the time of such payment, together with the costs and disbursements of this action and $350.00 attorney's fees and such additional amounts as the plaintiff may advance for the payment of taxes * * *" (Record page 60, Appendix III, page 48).

> "* * * that the Court determine and adjudge the priority of the liens of the defendants, United States of America and Chippewa County * * *" (Record page 61).

The Johnsons' answer and cross complaint contained the following allegation:

> "* * * that the United States of America, as these defendants are informed and verily believe, asserts that its lien is superior to the right of these defen-

ants as mortgagees to pay the delinquent real estate taxes accruing on the mortgaged premises subsequent to the effective date of the lien of the United States of America, and to add the amounts to the amount owing these defendants as said mortgagees * * *" (Record page 32, Appendix III, page 22a).

And their prayer for relief contained the following:

"* * * that this Court adjudge and determine the right of the plaintiff and these defendants under the terms of their respective mortgages to pay the real estate taxes on the mortgaged premises accruing subsequently to the effective date of the lien of the United States of America; * * *" (Record page 33, Appendix III, page 22a).

The County filed a brief in the trial court urging that the mortgagees be afforded this right. At record page 224, f. 4, it stated that it concurred with the Johnsons' position in this respect.

In their trial court brief, the Johnsons stated that they were willing to pay the taxes if they could claim the protection of their mortgage (Record page 224-11, Appendix III, page 23a). The Bank also, in its brief in the trial court, urged that it be afforded this right (Record pages 224-61, 224-64, Appendix III, page 24a-25a).

When Chippewa County appealed, this problem was squarely presented by all parties.

The County first raised it by complaining that the trial court had disregarded a statutory requirement for notice before judgment, thus depriving it of the right to buy the Bank's mortgage and add its taxes to that and claim for the whole (Record 316, 317, 318; App. III, p. 25a).

The Johnsons asked for the right to pay the taxes in their brief (Record 405, 406; App. III, p. 25a-26a). The

Banks' brief also covered the problem (Record 441-443; App. III, p. 26a-27a). The United States devoted one section of its brief to a discussion of it (Record 471-476). The brief of Amicus Curiae also urged this resolution (Record 485-488).

The Supreme Court of Wisconsin does not discuss the question in its opinion.

ARGUMENT

I.

Introduction.

A. Statutory basis for jurisdiction.

The federal questions presented for review are divided into two classes: (1) Those dealing with the ability of Chippewa County to collect its claimed real estate tax, and (2) Those which assume the county's tax is valid, but claim the mortgagees have the federal right to pay that tax and add it to their lien as against the United States lien.

This Court has jurisdiction of the first class of federal questions under the following language in *28 U. S. C. 1257*:

> "(3) By Writ of Certiorari, * * * where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution * * * or laws of the United States * * *."

Jurisdiction of the second question is conferred by the following language in the same statute:

> "(3) By Writ of Certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or Statutes * * * of the United States."

This view of the effect of the federal lien was the basis for the trial court's determination of priority. In its memorandum of decision, the trial court said:

> "It is not apparent how in the circumstances present the rights of lien claimants which are completely overridden by the encompassing size of the federal tax lien can in effect be revived. Without a mortgage on these premises there is nothing left for local real estate taxes, and accordingly where there is such a mortgage, there is nothing after the mortgage to which such taxes can attach. It is the property, not the mortgage, which is taxable, and the federal lien has taken that."

This was fully presented to the Supreme Court of Wisconsin in the brief filed by the Bank. So that there can be no question about its having been fully presented, we have caused all of the briefs filed in that Court to be certified as a part of the record in this cause. We would like to ask the Court to refer to the Bank's brief (Record pp. 429-440) at this point. The Johnsons also discussed the point in their brief at Record pp. 404-415.

B. Distinction between this case and U. S. v. New Britain (1954), 347 U. S. 81, 74 S. Ct. 367, 98 L. Ed. 520.

The questions presented here are an outgrowth of this Court's decision in *United States v. City of New Britain* (1954), 347 U. S. 81, 74 S. Ct. 367, 98 L. Ed. 520.

In that case, this Court dealt with the conflicting claims of local tax liens and a federal income tax lien. The dispute on appeal to this Court was between the local tax lien and the federal tax lien. The local tax lien claimed priority since it could be paid by the mortgagee who was admittedly prior to the U. S. lien. The federal lien claimed

priority as against the local lien on the basis of federal supremacy. This Court decided that as between the federal liens and the local liens, the prior in time was the prior in right. Then it stated in a dictum, that the United States was not interested in whether or not the city of New Britain received its taxes before the mortgagee since that was a matter of state law. The county seeks a literal interpretation of that decision in this case and ignores the question raised as to the validity of its tax which was levied after the federal tax lien attached. In other words, the difference between the two cases is: This case deals with the question of the validity of the taxes sought to be levied by the local government, whereas, the New Britain case dealt with a valid local tax and the question was its priority as against the federal lien.

C. The Wisconsin court did not discuss any of the federal questions in its opinion.

This, of course, raises the question of whether or not we have any standing to review that decision. We will devote the first section of our argument to that point, so that we will not weary the Court with repetition. Then we will discuss the federal questions separately, showing the basis for this Court's jurisdiction, and the reasons why it should grant certiorari, as to each.

II.

Since the Wisconsin Supreme Court actually decided the questions raised here, although it did not discuss them in its opinion, this court may properly review that decision.

We concede that even the most careful reading of the opinion of the Wisconsin Supreme Court would not indi-

cate that any of the questions here raised had been presented to it. The opinion simply makes no mention of them. We insist that these questions were properly before that court, and that it actually decided them against us, even though it did not say that it did.

For the purpose of discussing this point, we can state that the federal questions fall into two categories: (1) Those which question the county's ability or right to collect its tax, and (2), one that assumes that the county's tax is lawful and collectable, but claims that the mortgagees have the right to pay the county tax and add it to their mortgage liens at the expense of the federal lien.

The Wisconsin court did not discuss any of these questions, but it held that the county could collect its tax from the mortgagees, and it did not give the mortgagees the right to pay the taxes at federal expense. The *effect* of the decision is, therefore, to decide both questions, and to decide them adversely to us.

It is clear that this failure on the part of the Wisconsin Supreme Court does not defeat federal jurisdiction. To so hold would, of course, allow lower courts to prevent this Court from reviewing any embarrassing question, by the simple expedient of not discussing it.

The only effect of the lower court's action (or rather, failure to act) seems to be to raise the question of whether or not there was an adequate non-federal basis for its action.

In *Ellis v. Dixon* (1955), 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231, this Court considered a case much like this one. In that case, the New York Court of Appeals denied a motion for leave to appeal, but without opinion. This Court said:

> "In these circumstances, we must ascertain whether that court's decision 'might' have rested on a non-federal ground * * *."

There cannot possibly be any non-federal ground here, for two reasons:

First, there has never been any claim below that our procedure was in any way faulty. Instead, the federal questions have been argued on the merits at each stage by all parties.

Second, except for a procedural defect, it is not possible to have a non-federal ground here. Either the county's tax is unlawful or it is not. If the tax is lawful, then the mortgagees either have the *federal right* to pay it, or they do not. The case is that simple.

To summarize, the lower court's failure to discuss these questions in its opinion does not preclude this Court from reviewing the case, *because the lower court actually decided the issues.*

III.

The federal question which deals with the county's ability to levy and collect its tax has not been decided by this court.

A. Statement of the problem.

The first question is as follows:

> "In those cases where a federal income tax lien exceeds the value of the taxpayer's property, and where that property is subject to mortgages which are prior to the federal lien, may state or local government, after the federal lien is filed, continue to levy and collect a real estate tax on the full market value of the property, or is it barred from taxing that part of the property taken by the federal lien, by:
>
> (a) The statutes creating and defining the federal lien.

(b) The due process clause of the Fourteenth Amendment to the Federal Constitution.

(c) The equal protection clause of the Fourteenth Amendment to the Federal Constitution?"

A summary of the reasoning behind this facet of the case is essential to an understanding of its importance. An extended discussion can be found in the briefs in the Wisconsin Supreme Court (Bank's Brief, Record pp. 429-440, Johnson's Brief, Record pp. 395-415).

The statutes which create and define the federal lien, and the cases construing them, show that the federal lien takes the property of the taxpayer when it attaches. The effect of this on the United States is obvious—once its lien has attached, the state government cannot tax the property and collect the tax from the United States. (This has been the unanimous holding of the federal courts that have considered the problem.)

Since the federally owned share is not taxable by the state, the state cannot continue to levy a tax on the whole of the market value of the property, and collect it from the mortgagees' interest.

The due process clause, and the equal protection clause both limit the state's power to tax, to a tax on the value of the mortgagees' interest.

Under Wisconsin law, real estate is assessed to the owner, not split up into mortgagor and mortgagee interests. Since the United States had become the owner of the property, no tax could be levied or collected.

Any other decision would disregard the clear intent of Congress in enacting Sec. 3672, *Title 26, U. S. C.* which protects mortgagees from the federal lien.

B. Jurisdictional basis for review of the question.

The foregoing summary clearly shows that this is a federal question.

> "A federal question is raised * * * where the case involves a question of the construction and application of a congressional enactment * * *"
>
> *54 Am. Jur., United States Courts*, Sec. 246.

> "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question."
>
> *United States v. Security Trust and Savings Bank* (1950), 340 U. S. 47, 71 S. Ct. 111, 95 L. Ed. 56.

Jurisdiction is conferred on this Court to review this case by *28 U. S. C.* 1257(3) which permits the use of a writ of certiorari where the state statute is claimed to be repugnant to a federal statute, and also under that portion of the statute which permits review where a right under a federal statute is claimed.

C. Basis for issuance of a writ of certiorari.

We have been wholly unable to find any decision of this Court dealing with this problem. As a matter of fact, there seems to be only one decision of any court that even mentions its existence. That is the opinion of the District Court in *United States v. City of New York* (D. C. E. D. of N. Y., 132 F. Supp. 779). In that case, the United States was suing to quiet title to real estate it had sold at a distraint sale to foreclose an income tax lien. The city claimed for taxes levied after the federal lien attached to the property, and before the sale. The United States had purchased the property at the sale. That court had no difficulty in

finding that the city could not collect its taxes as against the United States, and in the course of its decision it said:

> "If the question were to arise in reference to a deed made to a private purchaser at such a public sale it might be even more difficult of resolution."
>
> *United States v. City of New York* (D. C. E. D. of N. Y.), 132 F. Supp. 779.

Since the issue has never been decided by this Court, the provisions of Rule 19(1)(a) govern.

There is an important practical reason why this question should be reviewed by this Court. It is that as the matter now stands, when the government forecloses its lien, and there is a mortgage also attached to the property, a buyer at a distraint sale will bid less for the property than he actually could. This is because under the state of law left by the *Henneman* case decision in the Wisconsin Supreme Court, the private buyer will have to pay the real estate tax accruing after the lien attached and before the sale. If, however, that tax is invalid, then on distraint sale the government will receive the full value of the property, not the value of the property less accrued real estate taxes. We think that this should interest the federal government considerably in the decision of this case.

D. Reasons for granting certiorari.

Rule 19 also indicates that there must be special and important reasons for review. We believe this case fully qualifies.

First, the problem appears to arise with considerable frequency. It has only been since the decision in *United States v. New Britain* (1954), 347 U. S. 81, 74 S. Ct. 367, 98 L. Ed. 520, that this problem could arise; and yet there have been a very large number of reported cases

which have dealt with the priority circle. Of those, it is not possible to know how many might have been differently decided if the question of the local tax lien's validity had been raised.

Second, the priority circle has been extensively discussed by the bar. The American Bar Association has been particularly concerned. See:

Final Report of the Committee on Federal Liens ABA, 1959, pp. 18, 28-31;

Effect on Banks and Secured Lenders of Federal Tax Liens Proposals, Vol. 14, The Business Lawyer 782;

Federal Tax Liens—A Panel Discussion Summarized, Vol. 15, The Business Lawyer, p. 175 at p. 190.

At this time, a complete redrafting of the federal lien statutes has been proposed, but no action has been taken on it (HR 7914, HR 7915, S. 2305, 86th Congress).

E. Conclusion.

In conclusion then, we feel that the Court should grant Certiorari and review this problem because of the frequency with which it arises and because of its importance to federal revenues and its effect on distraint sales. The problem is new and has never been passed on by this Court, nor any other lower court so far as we can determine, except, of course, by the Supreme Court of Wisconsin in this cause.

IV.

This court should review the question inquiring as to the mortgagees' right to pay the local taxes and add them to their lien at the expense of the federal lien because this problem has arisen frequently in lower courts but has never been settled by this court.

A. Statement of the problem.

The second federal question presented to the Court is:

> "If the county's tax can be lawfully levied and collected, then may the mortgagees pay it and add it to the sums due under their mortgages at the expense of the federal lien where their mortgages or the state law give them that right as against all later liens?"

The Johnsons' mortgages contain a standard clause allowing them to pay real estate taxes and add such payment to the amount of their mortgage. Under Wisconsin law, this payment would then have priority over all junior lienholders. The question is whether or not that payment would have priority, as against the federal lien.

B. Reasons why certiorari should be granted.

There is really only one reason for granting certiorari on this question, but it is a most compelling one. It is the extensive conflict among the authorities that have dealt with the problem.

There is a conflict in the decisions of the courts of appeal that have dealt with the problem. The following cases have allowed the mortgagees priority for such advances without any extended discussion:

U. S. v. Seaboard Citizens National Bank (1953), CA-4th, 206 F. 2d 62;

U. S. v. American National Bank of Jacksonville (1958), CA-5th, 255 F. 2d 504.

The following cases have denied the mortgagees priority for such advances:

U. S. v. Christenson (1959), CA-9th, 269 F. 2d 264;
U. S. v. Lord (1957), DC-D. N. H., 155 F. Supp. 105.

The only state court case which has discussed the problem at length allowed tax advanced as a cost of preservation of the property. This case contains an extended discussion of the problem.

Rikoon v. Two Boro Dress, Inc. (1957), 171 N. Y. S. 2d 19.

The problem has arisen with such frequency that it has been discussed in various legal literature.

Anderson, *Federal Tax Liens—Their Nature and Priority*, Vol. 41, Cal. Law Rev. No. 2, p. 241, at p. 269, 270.

The American Bar Association committee on federal liens discussed this problem in its report and considered it an open question.

Final Report of the Committee on Federal Liens, American Bar Association, Feb. 23, 1959, pp. 29-30.

It is obvious that this question is going to arise in every mortgage foreclosure that involves a federal income tax lien. Sooner or later this Court is going to have to pass on it. Under the present state of the law, mortgagees do not know whether or not they dare to advance sums for local real estate taxes once a federal lien has been filed. For example, after the decision in this case by the Supreme Court of Wisconsin, the Rowley Service Bureau of Madi-

son, Wisconsin, in its Bankers Service letter, advised its clients that in this situation, they should pay local real estate taxes and that if they did these would be prior to the federal lien.

> *Rowley Service Bureau, Bankers Service Letter,* June 17, 1960.

The conflict in the authorities, and the frequency with which the problem will arise make this a proper question for certiorari.

C. Special problems presented by the record.

We believe that the respondents will oppose the issuance of a writ of certiorari, because neither of the mortgagees have actually paid the county's taxes.

This point totally ignores the very nature of this case. In their complaint the Johnsons alleged as follows:

> "* * * that the United States of America, as these defendants are informed and verily believe, asserts that its lien is superior to the right of these defendants as mortgagees to pay the delinquent real estate taxes accruing on the mortgaged premises subsequent to the effective date of the lien of the United States of America, and to add the amounts to the amount owing these defendants as said mortgagees." (Record p. 32; Appendix III, p. 22a).

The prayer for relief demanded judgment determining their right to pay the county's tax and claim priority against the federal lien. The trial court, in its opinion, said:

> "Among the contentions advanced in briefs of counsel is that the mortgagees should even now be permitted to pay the real estate taxes and add the amount thereof to the mortgage debt. As herein indicated that is not necessary to maintain the preferred position of

the mortgages, and it is most doubtful whether such procedure could be sustained as against the federal lien" (Record p. 115; Appendix I, p. 2a).

It is perfectly proper to ask for such relief in a mortgage foreclosure action in Wisconsin. In other words, a party can have declaratory relief in such an action. This is provided for by Sec. 278.10(4) of the *Wisconsin Statutes*, which allows such advances to be added to the judgment by order after it is entered.

It is obvious that in a Wisconsin foreclosure action the mortgagee need not pay the taxes without having the Court's opinion as to their priority. Therefore, this question is properly before this Court in this case.

There is one further point that the Court should consider in this connection. That is that the Bank's mortgage amounted to only about $8,000.00, and the Johnsons' to about $25,000.00, while the County's taxes amounted to a sum in excess of $15,000.00. We believe that it is unrealistic and unreasonable to expect the mortgagees to risk the further sum of $15,000.00 in order to even have standing to raise this question.

In summary then, we believe the question as to the right of the mortgagees to pay the county's tax is a serious one which should be resolved by this Court at the first opportunity. There is a conflict in the decisions of the lower courts which should be resolved by this Court.

V.

CONCLUSION

A. Nature of relief sought.

We are first asking that the Court adjudicate the effect of the federal lien. If, where it exceeds the taxpayer's inter-

est in his property, it takes that property and prevents taxation by the states then a further examination of the problem is not necessary.

If, however, the county's tax is valid then a further question is presented. That is whether or not the mortgagees may pay that tax and add it to their mortgage liens as against the federal lien.

B. Summary of reasons for granting.

The question as to the validity of the county's tax is an important one, and has never been decided by this Court. We think the law as it now is adversely affects the United States because it tends to lower the bids made at distraint sales.

If the Court finds that the county's tax is valid and collectable the question of enlargement of the mortgage liens at the expense of the federal lien is presented. There is considerable conflict in the authorities on this question, and because of its effect on foreclosure proceedings it should be resolved as soon as possible by this Court.

Respectfully submitted,

INGOLF RASMUS AND
JAMES B. HALFERTY
Attorneys for Joint Petitioner First National Bank of Chippewa Falls
MARSHALL WILEY
Attorney for Joint Petitioners Andy and Violet Johnson